May 1, 2002

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St., SW
Washington, DC 20554

Re: Response to written *Ex Parte* Submission of AOL Time Warner (CS No. 01-290)

Dear Ms. Dortch:

On behalf of Consumer Federation of America, *et al.* ("CFA, *et al.*"), Media Access Project respectfully submits this response to the April 4, 2002 written *ex parte* submission of AOL Time Warner, Inc. ("AOLTW") in the above-shown docket.

AOLTW argues that *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002) (*pet. for recon.* pending) ("*Fox*") altered the standard set forth in Section 628(c)(2)(D) of the Communications Act, under which the Commission must determine whether to allow its program access rules to lapse.

Because *Fox* involved an entirely different statute, one with no connection or relevance whatsoever to Section 628(c)(2)(D), the Commission should reject AOLTW's argument. The *Fox* case involved a specific provision of the Telecommunications Act of 1996: Section 202(h). That section explicitly addresses the ***broadcast*** media, and is limited to the Commission's broadcast media ***ownership*** rules. As Section 202(h) states:

> The Commission shall review its rules adopted pursuant to ***this section*** [§202] and all of its ***ownership*** rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition.

(emphasis added)

The *Fox* Court interpreted the word "necessary" by looking to the specific "mandate of §202(h) [which] might be better likened to Farragut's order at the Battle of Mobile Bay ('Damn the

torpedoes! Full speed ahead)." *Fox,* 280 F.3d at 1044; s*ee also Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148, 264 (D.C. Cir 2002) (Sentelle, J., dissenting).

The *Fox* Court's analysis of Section 202(h) clearly has no application to the interpretation of the word "necessary" in Section 628(c). Section 628(c) was part of the 1996 Telecommunications Act, in which Congress significantly relaxed existing regulations and established, according to the *Fox* Court, a bias against continued structural regulation. The *Fox* Court placed great weight on the fact that Section 202(h) should be construed with due regard for the deregulatory context of its adoption.

By contrast, the purpose of the1992 Cable Act was ***regulatory*** in nature; indeed, the law was adopted to address the impact of earlier deregulation. As such, the 1992 Act proceeds from a diametrically opposite position as the 1996 Act, and reaches the opposite conclusion. The statute begins with findings that the cable industry faces little local competition and that cable system operators can therefore exercise monopsony power over programmers to the detriment of programmers, competitors, and the public generally. 1992 Cable Act, §§ 2(a)(2)-(5). Therefore, "to promote the public interest, convenience and necessity by increasing competition and diversity in the multichannel video market," §628(a), Congress imposed a new set of regulations on the cable industry.

No reason exists to conclude that, in reregulating the cable industry in 1992 to limit the exercise of monopoly power, Congress intended to imbue the word "necessary" in §628(c)(5) with any bias against regulation. To the contrary, Congress' expansive instruction that the Commission ensure that the rule continue to promote both competition and diversity indicates that Congress had no intention to change the Commission's general public interest standard, which includes consideration of both competition and diversity. *See, e.g., FCC v. Nat'l Citizens Comm. For Bcstng* 436 U.S.

775, 795-96 (1978). These considerations are equally valid under the 1992 Cable Act. *Time Warner Entertainment Co. v. FCC*, 211 F.3d 1313, 1319-20 (D.C. Cir. 2000).

In short, the recent opinions of the United States Court of Appeals for the D.C. Circuit, interpreting the word "necessary" in the context of Section 202(h) of the Telecommunications Act of 1996 have no bearing on the meaning of word "necessary" used here. Congress drafted Section 628(c)(5) as part of an entirely different statute, with an entirely different end in mind. By contrast, the language of the Cable Act of 1992 and Section 628 itself make clear that Congress intended the Commission to employ its usual standard under the public interest, *i.e.*, does continuation of the rule promote competition and diversity? As the record clearly shows, continuation of the program access rules will continue to promote competition and diversity, and the Commission must therefore retain the rule.

Sincerely,

Andrew Jay Schwartzman
President/CEO